

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

IN THE MATTER OF: : Docket No.
: 2012-6 CRB CD 2004-
Distribution of the 2004- : 2009 (PHASE II)
2009 Cable Royalty Funds :
:

IN THE MATTER OF: :
: Docket No.
Distribution of the 1999- : 2012-7 CRB SD 1999-
2009 Satellite Royalty : 2009 (PHASE II)
Funds :
:

VOLUME II

Tuesday,
April 14, 2015

Room LM-408
Madison Building
Library of Congress
101 Independence Avenue, S.W.
Washington, D.C.

The above-entitled matter came on for
hearing, pursuant to notice, at 9:10 a.m.

BEFORE:

THE HONORABLE SUZANNE M. BARNETT,
Copyright Royalty Judge

THE HONORABLE JESSE FEDER,
Copyright Royalty Judge

THE HONORABLE DAVID R. STRICKLER,
Copyright Royalty Judge

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1 a lot of industries or segments of an industry
2 that's in its infancy, I think there was a lot
3 more negotiating at the local basis the
4 retransmission phenomenon was going through its
5 infancy.

6 JUDGE FEDER: Okay. Thank you very
7 much.

8 JUDGE BARNETT: Any follow-up?

9 VOICES: Nothing.

10 JUDGE BARNETT: Okay. Thank you Mr.
11 Sanders. You may step down.

12 MR. MACLEAN: Your Honor, the SDC
13 calls Toby Berlin.
14 Whereupon,

15 TOBY BERLIN
16 was called as a witness and, after having been
17 first duly sworn, was examined and testified as
18 follows:

19 JUDGE BARNETT: Please be seated.

20 DIRECT EXAMINATION

21 BY MR. MACLEAN:

22 Q Good morning, Ms. Berlin.

1 A Hi.

2 Q As you know, I'm Matthew Maclean. I
3 represent the Settling Devotional Claimants.
4 Could you please introduce to your judges,
5 starting with the spelling of your first and last
6 name?

7 A Sure. It's Toby, T-O-B-Y, Berlin, B-
8 E-R-L-I-N. I have an undergraduate degree in
9 Business from the University of Miami, and a law
10 degree from Southwestern University of Law in Los
11 Angeles.

12 I had a stint in a large casino and a
13 stint in a theatrical agency, and now I'm -- from
14 October of '98 through July of 2013, I was at
15 DirecTV, where I was a vice president of
16 Programming Acquisitions. My responsibilities
17 were general entertainment, Spanish,
18 International, Adult, Audio Music, Airborne,
19 which were airlines.

20 When DirecTV got the right to do local
21 to local, I handled all of those deals, which was
22 about 143 DMAs. I also started their pay-per-

1 view business, and finally I was the founder and
2 president of the Women's Group called the Women's
3 Leadership Exchange. In all of those areas, I
4 did the content acquisition deals.

5 Since July 2013, I have my own
6 consulting business called School of Toby, and I
7 do pretty much the same thing. Content
8 acquisition deals for various distributors. I
9 also advise hedge funds that are interested in
10 investing in the cable, satellite, telco over the
11 top arena.

12 In addition, I'm the content
13 acquisition and strategy consultant for Sony
14 Playstation on their Vue product, which is an app
15 on the Playstation, which is about 120 live
16 networks through the Playstation Vue, all
17 delivered over the top.

18 Q Have you ever testified as an expert
19 witness before?

20 A No.

21 JUDGE FEDER: Excuse me. Just one
22 question. What is over the top?

1 THE WITNESS: Sorry. Via the
2 Internet. It's kind of acronyms that we use to
3 confuse everybody.

4 JUDGE FEDER: Confused me.

5 (Laughter.)

6 BY MR. MACLEAN:

7 Q So now your experience with respect to
8 programming was primarily developed at DirectTV,
9 is that right?

10 A That's correct.

11 Q A satellite system operator?

12 A Correct. We were a satellite
13 distributor of live networks.

14 Q Are you also familiar with the
15 programming decisions made by cable system
16 operators?

17 A I am.

18 Q And in what way have you become
19 familiar with cable system operators essentially?

20 A Well, it's a very similar business.
21 We all try to acquire subscribers and keep
22 subscribers.

1 In addition, I've always made it a
2 point to be really good friends with my folks
3 that do the same thing that I do. So I'm well
4 aware of the issues that we all face, and through
5 my stint at DirecTV I was -- many head hunters
6 called me to do the same thing for a cable
7 operator.

8 So it really is the same identical
9 business. Getting and keeping subscribers, and
10 the programming deals do not differ at all.

11 Q Would you regard cable system
12 operators as among the competitors of DirecTV?

13 A Yes, exactly.

14 Q Are you background and your
15 qualifications more fully set forth in the
16 written testimony we submitted?

17 A Yes.

18 MR. MACLEAN: Your Honor, I offer Ms.
19 Berlin as an expert in satellite and cable
20 television programming.

21 MR. BOYDSTON: Your Honor, may I voir
22 dire?

1 JUDGE BARNETT: You may.

2 VOIR DIRE

3 BY MR. BOYDSTON:

4 Q Thank you, Your Honor. Good morning,
5 Ms. Berlin. My name is Brian Boydston,
6 representing the Independent Producers Group.
7 When did you first speak with a representative
8 from the SDC?

9 MR. MACLEAN: Objection, Your Honor.
10 That has nothing to do with --

11 JUDGE BARNETT: That has nothing to do
12 with her expertise.

13 MR. BOYDSTON: May I make an offer of
14 proof, Your Honor, or an explanation?

15 JUDGE BARNETT: Yes.

16 MR. BOYDSTON: Ms. Berlin spoke with
17 IPG before -- we believe before she spoke with
18 the SDC. IPG provided her attorney with various
19 proprietary and confidential information, and
20 then several weeks later, it was made known to us
21 that she was retained by the SDC, and we wish to
22 find out the details of that, but we don't know.

1 But we want to know whether or not
2 certain information was passed on without our
3 knowledge.

4 MR. MACLEAN: Your Honor, whether or
5 not, that would be permissible for cross-
6 examination. It certainly is not permissible for
7 voir dire. It has nothing to do with her
8 qualifications as an expert.

9 MR. BOYDSTON: I couched this voir
10 dire, Your Honor, only because I believe that if
11 the facts came out a certain way, there could be
12 grounds to strike her testimony. That's why I
13 couched this voir dire.

14 JUDGE BARNETT: Okay, all right. It's
15 not voir dire, so have a seat Mr. Boydston.

16 JUDGE STRICKLER: I have a question.
17 Is this part of the written objections that
18 you've made, that we need to rule upon?

19 MR. BOYDSTON: To a degree, except we
20 are -- yes, but we are operating in a vacuum of
21 information, which I seek to close up with a few
22 questions when I have the opportunity.

1 JUDGE STRICKLER: So you've moved or
2 applied to strike her testimony, but you're
3 saying --

4 MR. BOYDSTON: I beg your pardon, Your
5 Honor. We did not. We did not in a written --
6 that was not one of our written objections filed
7 ahead of time, to answer your question.

8 JUDGE STRICKLER: So we won't see it
9 in any papers that we have now. This is speaking
10 objection that you may have --

11 MR. BOYDSTON: That's correct.

12 JUDGE STRICKLER: --depending upon
13 what you develop in cross-examination?

14 MR. BOYDSTON: Exactly.

15 (Pause.)

16 JUDGE BARNETT: We're going to consult
17 for a couple of minutes.

18 (Whereupon, the above-entitled matter
19 went off the record at 10:15 a.m. and resumed at
20 10:27 a.m.)

21 JUDGE BARNETT: Please be seated.
22 Counsel, we're going to treat this speaking

1 motion the same as we are treating all of the
2 other motions that are pending. So Mr. Boydston,
3 to the extent you want to develop anything on
4 cross-examination you may.

5 Just so you're aware of our thinking,
6 what I think is is that responses to all of the
7 pending written motions that would otherwise have
8 been due today or tomorrow should be filed with
9 your proposed findings and conclusions, or
10 simultaneously with your proposed findings and
11 conclusions, and replies to those motions should
12 be filed simultaneously with your reply findings
13 and conclusions, and then we'll have the whole
14 record to work with.

15 MR. MACLEAN: Your Honor, with respect
16 to the subject, IPG has submitted no objection to
17 the testimony of Ms. Berlin. Objections were due
18 last Tuesday. They didn't file any written
19 objection or motion, with respect to Ms. Berlin's
20 testimony.

21 JUDGE BARNETT: That is true. I
22 understand that. So that will be part of your

1 response no doubt.

2 MR. MACLEAN: Yes, Your Honor.

3 DIRECT EXAMINATION (resumed)

4 BY MR. MACLEAN:

5 Q With respect to your written
6 testimony, have you spoken with Mr. Galaz?

7 A I did.

8 Q How many times?

9 A Once.

10 Q Can you explain the circumstances?

11 A He was introduced to me by a former
12 DirecTV attorney, who hadn't -- I don't -- I just
13 have a friendly relationship. I don't work with
14 him. He's not under my employ, and we were
15 introduced via email and he called me once.

16 Q By the time -- by that time when he
17 called you, had you begun speaking with Mr.
18 Lutzker on behalf of the SDC?

19 A Yes, I had already spoken to Mr.
20 Lutzker.

21 Q Had you been engaged as an expert for
22 the SDC at that time?

1 A We were discussing, but I hadn't been
2 engaged.

3 Q Were you ever engaged as an expert
4 witness or expert consultant for IPG?

5 A No, I was not engaged by them.

6 Q After that initial phone call with Mr.
7 Galaz, did you ever speak with Mr. Galaz again?

8 A I did not.

9 Q Did you agree on that phone call to
10 serve as an expert?

11 A No, I did not agree to do anything.
12 I didn't ask him to send me any documents. I
13 mostly listened. Quite honestly, I didn't
14 understand it or didn't think it was the same
15 case for quite some time, and then I -- but there
16 was no meeting of the minds in any aspect.

17 JUDGE STRICKLER: You say you didn't
18 ask him to send you any documents?

19 THE WITNESS: I did not.

20 JUDGE STRICKLER: Thank you. Did he
21 in fact send you any documents?

22 THE WITNESS: He sent me one document.

1 JUDGE STRICKLER: Did you keep it or
2 did you send it back to him?

3 THE WITNESS: I still have it.

4 JUDGE STRICKLER: How did he send
5 that?

6 THE WITNESS: He sent it via email.
7 Again, I didn't ask for any documents and I -- it
8 went into sort of the email chain. I don't think
9 I even looked at it or read it, because I again
10 didn't ask for it. We weren't engaged. My
11 friend was copied on it, so I can't see how they
12 would say it's confidential.

13 He didn't ask me to treat it as
14 confidential. I don't have any privilege with
15 him at all.

16 JUDGE STRICKLER: Your friend is
17 referred to -- the attorney that you mentioned
18 before in your testimony?

19 THE WITNESS: Yes, exactly.

20 JUDGE STRICKLER: Do you have a copy
21 of that email in court, the hearing room today?
22 I don't want it now. I just want to know if you

1 have it.

2 THE WITNESS: I have my laptop with
3 me, and it's in there.

4 JUDGE STRICKLER: So is it available
5 for us to look at should we choose to?

6 THE WITNESS: Uh-huh, right.

7 BY MR. MACLEAN:

8 Q Subsequent to that conversation with
9 Mr. Galaz, were you engaged by the SDC?

10 A Yes, I was.

11 Q How long after that conversation?

12 A Maybe a week to ten days.

13 Q Subsequent to your engagement by the
14 SDC, were you again contacted by anybody on
15 behalf of IPG?

16 A I was.

17 Q Can you explain the circumstances of
18 that?

19 A Dr. Robinson called me about a month
20 later, and I had never met her, and she made it
21 sound like she was working for Mr. Lutzker's
22 firm, and so I immediately got off the phone and

1 contacted Mr. Lutzker and said is she on her
2 team, and I subsequently found out she wasn't,
3 and sent her a note to say that I wasn't engaged.

4 JUDGE STRICKLER: Excuse me. When
5 you say she made it sound like she was with your
6 team, working with Mr. Lutzker, what as far as
7 you recall did she say to make you come to that
8 conclusion?

9 THE WITNESS: Well, it was about a
10 month later, from when I had spoken to Mr. Galaz,
11 and she said I'm from the attorney's office, or
12 I'm from -- on the case, you know, and I hadn't
13 spoken to anyone in a month. So but it sounded
14 like oh, you know, I'm ready to discuss your
15 testimony with you, something along those lines.

16 JUDGE STRICKLER: And she didn't
17 identify which attorney?

18 THE WITNESS: No.

19 JUDGE STRICKLER: Thank you.

20 BY MR. MACLEAN:

21 Q And after speaking with Mr. Lutzker
22 about that phone call, did you respond to Dr.

1 Robinson?

2 A Yes, I did.

3 Q And what was your response?

4 A That I had a conflict and couldn't
5 speak with her.

6 MR. MACLEAN: Let's take a look at
7 your written testimony. In the binder in front
8 of you, turn to SDC Exhibit 633.

9 (Whereupon, the above-referred to
10 document was marked as SDC Exhibit No. 633 for
11 identification.)

12 JUDGE STRICKLER: Before you do that,
13 after the first conversation you had with Mr.
14 Galaz when you received the email, and before you
15 heard from Dr. Robinson, did you ever get back to
16 Mr. Galaz, I want to make sure I understand this,
17 and tell him "I'm sorry, I can't work with you
18 because I have a conflict. I'm working with the
19 SDC," or you just didn't get back to him at all?

20 THE WITNESS: I just did not get back
21 to him.

22 JUDGE STRICKLER: Thank you. I'm

1 sorry, go ahead.

2 BY MR. MACLEAN:

3 Q Turn to SDC 633.

4 A Yes.

5 Q What is SDC 633?

6 A It's my testimony.

7 Q If you could turn to the last page.

8 A Uh-huh.

9 Q I'm sorry, the last page before
10 Exhibit 1, which is at the bottom. Is that your
11 signature on the last page?

12 A Yes, it is.

13 Q Is everything in this testimony true
14 and correct?

15 A Yes, it is.

16 Q Do you have any changes to this
17 testimony?

18 A No, I don't.

19 Q And Your Honor, I'm sorry. I don't
20 think you've ruled on my offer of Ms. Berlin as
21 an expert as an expert in satellite and cable
22 television programming.

1 JUDGE BARNETT: You're right. Any
2 objection?

3 MR. OLANIRAN: No objection.

4 MR. BOYDSTON: No objection, Your
5 Honor.

6 JUDGE BARNETT: Okay. Ms. Berlin has
7 been authorized to testify as an expert in --

8 MR. MACLEAN: Satellite and cable
9 television programming.

10 JUDGE BARNETT: Thank you. Satellite
11 and cable television programming.

12 MR. MACLEAN: Your Honor, I offer SDC
13 633 into evidence.

14 MR. BOYDSTON: Your Honor, no
15 objections except for the ones we may have,
16 depending upon the content, as we've discussed.

17 JUDGE BARNETT: Okay.

18 MR. OLANIRAN: No objection.

19 JUDGE BARNETT: 633 is admitted.

20 (Whereupon, the above-referred to
21 document was received into evidence as SDC
22 Exhibit No. 633.)

1 MR. MACLEAN: Your Honor, I'll also
2 note for the record that SDC 634, and we
3 submitted her testimony in both the cable and
4 satellite proceedings prior to the consolidation,
5 SDC 634 is identical to SDC 633, and we submitted
6 the same testimony in both so as not to burden
7 the judges of the Copyright Royalty Board. We're
8 not going to offer 634, simply because it's
9 identical to 633.

10 (Whereupon, the above-referred to
11 document was marked as SDC Exhibit No. 634 for
12 identification.)

13 JUDGE BARNETT: Okay. Would you
14 actually withdraw?

15 MR. MACLEAN: We will withdraw SDC
16 634.

17 JUDGE BARNETT: Thank you.

18 (Whereupon, SDC Exhibit No. 634 was
19 withdrawn.)

20 BY MR. MACLEAN:

21 Q All right. Ms. Berlin, I don't want
22 to go through your entire written testimony

1 because we have an agreement amongst the parties
2 and with the judges not to rehash. These matters
3 are already set forth.

4 But just to get to some of the
5 arguments that have been made by IPG, and I'll
6 get right to the heart of it, in your written
7 testimony, you talk about Nielsen ratings being
8 important in the decision-making by cable and
9 satellite operators to carry programming and
10 stations; correct?

11 A Yes, I do.

12 Q You also talk about the importance and
13 your participation in courting these markets,
14 like devotional programming, Spanish language-
15 speaking and other markets of that nature, or you
16 know, subparts of the market; is that right?

17 A Yes.

18 Q Now by definition, programming geared
19 towards a niche market or a small subpart of the
20 market might have lower ratings than programming
21 that is more broadly marketed or more broadly
22 attractive, right?

1 A That's correct.

2 Q Okay. So how do you reconcile these
3 two, these two claims, one that ratings are an
4 important single driver, and the other that
5 quirky, niche or subsets of the market is
6 important?

7 A Sure. So the way that I always looked
8 at it is that, sort of going back to the basics,
9 my job was to get and keep subscribers by virtue
10 of content, and what we found early on at DirecTV
11 is that we reached sort of a maturation or
12 saturation point with certain areas, like general
13 entertainment, and then in order to grow the
14 business, we needed to look at niche markets.

15 There in fact we found very fertile
16 ground, Spanish, international, religious,
17 children and I headed up most of those
18 businesses. Then within those niches, I would
19 look at the Nielsen ratings, to decide which
20 stations I would carry within the out of market
21 DMAs.

22 Q Now why would you do that?

1 A I just felt that Nielsen, you know,
2 I'm not one to reinvent the wheel. It's what we
3 all use to look at the popularity of like -- for
4 like programming stations, and I found that it
5 gave me the best indicator of the popular
6 stations.

7 Q To your knowledge and understanding,
8 is this also the kind of analysis that your
9 competitors would conduct?

10 A Yes.

11 Q Was there some -- why did you consider
12 Nielsen in particular a measure of viewership?

13 A Well, there were a couple of reasons.
14 First of all, everything comes with a cost, and
15 in a big corporation, there's a lot of eyeballs.
16 I was a cost center. So there were eyeballs on
17 every decision that I made that cost the company
18 money.

19 So I needed to have a reason why I
20 would make these decisions, and Nielsen provided
21 me with a really good backbone to make these
22 decisions, and one that was recognized by the

1 different groups within DirecTV that had
2 oversight on the spending that I would make.

3 Q Did you consider -- did you consider
4 Nielsen information when deciding whether to
5 retransmit a broadcast station from a distant
6 market?

7 A Yes.

8 Q When you were considering Nielsen's
9 information in that context, would you consider
10 the ratings information from the originating
11 market, or from the market in which you were
12 retransmitting?

13 A I looked at both. I would look at --
14 I found that they were both good indicators. So
15 I would look at the market where the station
16 resided, as well as the outside market.

17 Q Now were there circumstances in which
18 you were looking at acquisition of a distant
19 station, when viewership information in your
20 particular market was not available, maybe
21 because the station wasn't --?

22 A There were.

1 Q What would look at in those
2 situations, where you don't have Nielsen
3 information for the particular market in which
4 you are retransmitting?

5 A I would look at the DMA where the
6 station resided.

7 Q And did you find as a general matter
8 that the information that you would get from that
9 DMA would be transportable to making business
10 judgments in the DMA where you're retransmitting?

11 A Yes, exactly.

12 Q Have you ever had a circumstance where
13 you were surprised unpleasantly about the -- or
14 pleasantly, relating to the transportability of
15 the information you were relying on from an
16 originating DMA to the DMA where you were
17 retransmitting?

18 A No. I found the Nielsen very
19 valuable, and I was never surprised in my
20 decision-making.

21 JUDGE STRICKLER: I have a question
22 for you. When you look at religious programming

1 as a particular niche, you say you relied on
2 ratings predominantly to decide which ones would
3 be most attractive; is that correct?

4 THE WITNESS: Yes.

5 JUDGE STRICKLER: Did you ever do any
6 sub-niche work so as to distinguish between
7 whether or not you wanted more evangelical
8 religious programming or more Catholic
9 programming? I noticed you mentioned something
10 from the University of Notre Dame in your
11 testimony. Did you ever get that granular within
12 religious programming, or you treated all
13 religious programming as homogenous, for purposes
14 of making your business decision?

15 THE WITNESS: For the religious
16 programming, I treated it pretty homogenous, and
17 I relied on the ratings information to tell me
18 what was most popular in those DMAs or out of
19 market DMAs.

20 JUDGE STRICKLER: Thank you.

21 BY MR. MACLEAN:

22 Q Now the observation was also made I

1 think first by you and maybe by Mr. Galaz, that
2 DirecTV would rarely drop a station, that it
3 decided to retransmit. Is that an accurate
4 observation?

5 A Yes, that is.

6 Q And what's the reason for that?

7 A Every station, every channel, every
8 network has a constituency, a very vocal
9 constituency and we pretty much found out the
10 hard way when, I think very early on, there was a
11 very unpopular Japanese network dropped and, you
12 know, we got thousands of emails.

13 So from that moment on, and I think
14 most of them were in calls to my home number, so
15 from that moment on we decided, and we found that
16 there was just every station has a constituency
17 no matter, and they're very vocal.

18 Q How do you reconcile that
19 understanding with your claim that Nielsen
20 ratings are important in a carriage decision?

21 A Well, Nielsen ratings are the
22 measurement that I used, and then we would find

1 that the Nielsen ratings were in fact true and
2 the station would have quite a vocal group, and
3 let me just explain what the constituency that
4 was -- liked each station.

5 If my job was to get and keep
6 subscribers. I never wanted to lose a subscriber
7 by dropping a station. We never wanted a
8 subscriber to call the call center, because a
9 call center is basically to acquire sales, and
10 every call costs money.

11 So you never wanted to be the
12 executive that, you know, flooded a call center
13 basically. And then so the Nielsen ratings would
14 tell me what's popular, and I enjoyed getting
15 calls from my subscribers, letting me know that I
16 made a right decision.

17 Q Would the fact that you would
18 generally not drop a station once you were
19 carrying it, did that bear on your decision to
20 use the Nielsen ratings in the first place, in
21 deciding whether to carry --

22 A Exactly.

1 Q Why is that?

2 A Because you never wanted to make the
3 wrong decision, and I found that by using the
4 Nielsen ratings, I made the right decisions. It
5 never steered me wrong.

6 Q Now there's been a suggestion made and
7 testimony from IPG that you, and I'll quote you,
8 mistakenly suggest that distant retransmission by
9 SSOs could not occur prior to 1999. Do you have
10 a response to that claim?

11 A So there was prior to '99, and this
12 was before I was at DirecTV, there was an
13 instance where we were or they were able to
14 transmit the Big Four, would transmit as a
15 distant signal. But in my vernacular and what
16 I'm testifying to, is once DirecTV got the right
17 to launch local into local. So that's purely my
18 area of expertise.

19 Q Can you explain to the judges what
20 local into local means?

21 A Sure. It's basically the right to
22 carry a local station in a DMA.

1 Q And would those retransmissions be
2 negotiated?

3 A Yes.

4 Q Can you explain how that process would
5 work, the negotiation of local into local
6 retransmission?

7 A Sure. So basically we would decide to
8 go into a DMA. There were a lot of factors that
9 would determine why we would decide on a DMA,
10 population, topography, whether or not we had a
11 good installer or installers, and then we'd go
12 into a DMA.

13 We would need to announce it by
14 sending a letter to every station, and then a
15 station could either elect must-carry or
16 retransmission consent. Must carry meant I
17 needed to carry them; retransmit I had to
18 negotiate.

19 Then once the negotiations started,
20 the way that it works is per subscriber per
21 month. So if I say a dollar, it means I was
22 being charged a dollar per month per subscriber,

1 and they were highly negotiated deals.

2 Q And how would that price be
3 negotiated, that dollar versus some other number
4 per subscriber?

5 A There were a number of factors, but it
6 was mostly based on popularity of the station.

7 Q How was popularity of the station
8 typically measured?

9 A Nielsen ratings.

10 Q I just have -- just one more question.
11 Thank you. No further questions.

12 JUDGE BARNETT: Mr. Boydston.

13 MR. BOYDSTON: Thank you.

14 JUDGE BARNETT: You know, Mr.
15 Boydston, because of order of presentation, you
16 seem to always be interrupting your examination.

17 MR. BOYDSTON: All right.

18 JUDGE BARNETT: Why don't we take our
19 morning recess now, and then we won't have to
20 interrupt your questioning.

21 MR. BOYDSTON: Thank you, Your Honor.

22 JUDGE BARNETT: So we'll be at recess

1 for 15 minutes.

2 (Whereupon, the above-entitled matter
3 went off the record at 10:43 a.m. and resumed at
4 11:01 a.m.)

5 JUDGE BARNETT: Please be seated. Mr.
6 Boydston, cross-examination.

7 MR. BOYDSTON: Thank you, Your Honor.

8 JUDGE BARNETT: Oh, okay. Judge Feder
9 has a question while you're organizing.

10 MR. BOYDSTON: Okay, thank you.

11 JUDGE FEDER: Ms. Berlin, you
12 testified earlier that, in determining the price
13 point for retransmission consent, you considered
14 Nielson ratings to be given only at the level of
15 the station, the overall ratings for the station,
16 or did you ever look behind that at the ratings
17 for individual shows?

18 THE WITNESS: Well, shows are what
19 sort of drives the ratings for the station. So I
20 would look to see if it was, you know, what was
21 driving that heavy duty rating, what day part,
22 that kind of thing. But usually the station's

1 rating told the story of the shows.

2 But I did look underneath, because
3 also I might find something that I could exploit
4 on pay-per-view or a different mechanism within
5 DirectTV. So I was always looking for different
6 ideas, to see for a breakout then.

7 JUDGE FEDER: Thank you.

8 MR. BOYDSTON: Your Honor, may I
9 consult just for a moment with the Clerk about
10 two exhibits just one second?

11 JUDGE BARNETT: You may.

12 CROSS EXAMINATION

13 BY MR. BOYDSTON:

14 Q Good morning, Ms. Berlin. My name is
15 Brian Boydston. I'm the attorney for Independent
16 Producers Group. When did you first -- was Mr.
17 Lutzker the first person you spoke with from the
18 SDC?

19 A Yes.

20 Q And when was that, to the best of your
21 recollection?

22 A It was in mid or late February.

1 Q Of this year?

2 A No, of 2014.

3 Q Oh, 2014? Okay, and did they contact
4 you or did you contact them?

5 A They contacted me.

6 Q And did they say how they had found
7 your name or your information?

8 A Yes.

9 Q And what did they say?

10 A And actually let me go back. There
11 was a consultant that Mr. Lutzker used, John
12 Sanders, and he had contacted me first, the way
13 I'm recalling, and he connected with my old boss,
14 Derek Chang, and Derek had recommended me for
15 this.

16 Q And was Derek Chang a boss from
17 DirectTV then?

18 A Yes.

19 Q And so it was actually Mr. Sanders
20 that contacted you first, and then Mr. Lutzker?

21 A Yes.

22 Q And do you recall speaking with Raoul

1 Galaz?

2 A I do.

3 Q And that was approximately when? That
4 was March of 2014?

5 A Yes, early March.

6 Q At the time, I think you said you just
7 had one conversation with him; is that correct?

8 A Yes.

9 Q Did you exchange emails with him or
10 were there emails sent to you from Mr. Galaz?

11 A He sent me an email.

12 Q And you responded, do you recall?

13 A I did not.

14 Q At the time that you spoke with Mr.
15 Galaz, did you recall informing him as to whether
16 or not you had any familiarity with these
17 proceedings?

18 A I don't believe we discussed that.

19 Q I assumed you discussed the
20 proceedings, yes?

21 A Yes.

22 Q And did you tell him that you were

1 familiar with the proceedings?

2 A Again he -- I didn't recognize that it
3 was the same proceedings until very, very late in
4 the conversation.

5 Q Okay. Once you did, did you tell Mr.
6 Galaz that you already had some involvement in
7 the proceedings?

8 A No.

9 Q And do you recall, did Mr. Galaz tell
10 you how he came to contact you?

11 A Yes.

12 Q And what was that?

13 A Through Mike Nielsen.

14 Q And you explained that Mike Nielsen
15 was an attorney. How did you know Mike Nielsen
16 or how did he know you?

17 A Mike Nielsen was an attorney for
18 DirecTV, and assisted on local into local retrans
19 deals.

20 Q And had you worked with him in the
21 past then?

22 A At DirecTV.

1 Q And prior to Mr. Galaz contacting you,
2 did Mr. Nielsen contact you and tell you that Mr.
3 Galaz had been referred to you?

4 A Right, yes.

5 Q And did Mr. Nielsen tell you anything
6 further about what the content was?

7 A No.

8 Q I believe you testified that Mr. Galaz
9 emailed you a document?

10 A Yes.

11 Q And what was that document, to the
12 best of your recollection?

13 A I don't know. I didn't open it.

14 Q Okay. Did you forward any of your
15 emails from Mr. Galaz to anyone else?

16 A Yes.

17 Q And to who?

18 A To Arnie Lutzker.

19 Q Did you forward the email with the
20 attachment to Mr. Lutzker?

21 A Yes.

22 Q Did Mr. Lutzker ever discuss that

1 attachment with you?

2 A No.

3 Q Did you ever discuss that attachment
4 with Mr. Lutzker?

5 A No.

6 Q Are you aware -- I believe you
7 testified that it was your understanding that Mr.
8 Galaz sent documents to Mr. Nielsen?

9 A No, I did not testify to that.

10 Q My apologies. Did you have any
11 awareness that Mr. Galaz did send documents to
12 Mr. Nielsen?

13 A No.

14 Q Did Mr. Nielsen ever communicate with
15 you after your conversation with Mr. Galaz about
16 Mr. Galaz and possibly working with him?

17 A He, I believe, emailed or called and
18 just said I -- something like I hope it works out
19 or if it works out, that's fine, or something
20 along those lines. I don't actually recall, but
21 it was very brief.

22 Q Was there any substance to your --

1 have substance -- excuse me. Was there any
2 substance in your conversation with Mr. Nielsen
3 you just described, about Mr. Galaz's document
4 that he had sent to Mr. Nielsen?

5 A No.

6 Q So did Mr. Nielsen ever describe the
7 document to you?

8 A No.

9 Q Is it -- do you recall or are you
10 familiar with whether or not in June 2012, a new
11 CEO was installed at DirecTV named Michael White?

12 A Yes.

13 Q When did you leave DirecTV?

14 A July of 2013.

15 Q And what was the reason for your
16 leaving?

17 A I was ready to move on after close to
18 15 years.

19 JUDGE STRICKLER: Did you say the new
20 CEO was in June of '14, 2014, or 2013?

21 MR. BOYDSTON: Well, I said '10.

22 JUDGE STRICKLER: I'm sorry.

1 JUDGE BARNETT: No, I think he said
2 '12.

3 THE WITNESS: I think you said '12,
4 but it was '10.

5 MR. BOYDSTON: I beg your pardon.

6 JUDGE STRICKLER: Well, let's listen
7 to what the witness has to say, because she's the
8 only one testifying. What year was the new CEO?

9 THE WITNESS: You know, I think it was
10 2010. There was quite a few, so I'm not quite
11 sure what date, when he started.

12 BY MR. BOYDSTON:

13 Q While you at DirectTV -- well actually
14 strike that. Is it accurate to say that you're
15 being offered here as an expert on the subject of
16 local to local retransmission of broadcast
17 stations by satellite and cable system operators?

18 A What was the question?

19 Q I'm sorry. I'm just confirming on
20 your expert -- the reason you're here is to
21 testify as to your expertise with regard to the
22 subject of local to local retransmission of

1 broadcast stations by satellite and cable
2 operators?

3 A Correct.

4 MR. MACLEAN: Objection,
5 mischaracterizes --

6 JUDGE BARNETT: Sustains.

7 MR. MACLEAN: --the witness'
8 expertise.

9 MR. BOYDSTON: I'm sorry. I didn't
10 catch what the objection was.

11 MR. MACLEAN: It was sustained.

12 MR. BOYDSTON: I know that.

13 MR. MACLEAN: The objection was it
14 mischaracterizes the witness' expertise.

15 MR. BOYDSTON: Okay.

16 JUDGE BARNETT: Well, it might not
17 mischaracterize her expertise, but it
18 mischaracterizes what she was qualified to
19 testify to as an expert.

20 MR. BOYDSTON: Thank you, Your Honor.
21 Is the answer then stricken or is it on the
22 record?

1 JUDGE BARNETT: The answer's stricken.

2 MR. BOYDSTON: Okay. I was just
3 trying to clarify.

4 JUDGE BARNETT: If she answered, I
5 didn't hear the answer, so the objection was
6 sustained.

7 MR. BOYDSTON: Understood.

8 JUDGE BARNETT: Start from there.

9 BY MR. BOYDSTON:

10 Q Got it. Are you familiar with the
11 satellite statements of account that must be
12 prepared by entities such as DirecTV?

13 A I'm aware of them, yes.

14 Q Sounds like you probably didn't
15 prepare them then. That was someone else's job?

16 A Correct.

17 Q What's your understanding of them?

18 A That twice a year our supplier
19 payments person would calculate what was owed and
20 submit them to the Copyright Tribunal.

21 Q And I beg your pardon. When did you
22 start at DirecTV again?

1 A I started in October of 1998.

2 Q Thank you. So I believe that you
3 stated that satellite carriers did not have the
4 ability to carry local broadcast stations until
5 1999; is that correct?

6 A Yes. The exact date of the passing of
7 the liability was late '99, early 2000.

8 Q Okay. Despite that, do you have an
9 understanding as to how -- whether or not prior
10 to 1999, satellite carriers could carry signals
11 distantly, going back to 1988?

12 A Right. There was, and that is not my
13 area of expertise, but they did have the ability
14 to carry the Big Four into DMAs, other DMAs.

15 Q And the Big Four are?

16 A ABC, NBC, CBS and Fox.

17 Q Okay. You said that's not your area
18 of expertise. Specifically what do you mean?

19 A Right, because what I did at DirecTV
20 was, as I testified, when we got the right to
21 open local into local or to start broadcasting
22 local stations in DMAs, that's when I started to

1 do those deals. I wasn't involved in those deals
2 or any kind of deals with local into local and
3 distant network prior to that time.

4 Q Okay. So prior to that time, you
5 weren't involved with local into local or distant
6 you said; correct?

7 A Correct.

8 Q Okay, but then after that time, you
9 were involved with local to local?

10 A Yes.

11 Q Were you involved in local to distant,
12 or excuse me, were you involved in distant?

13 A Yes, I was.

14 Q Okay. Now you said that you oversaw
15 the launch of 2,100 stations and 143 DMAs;
16 correct?

17 A Yes.

18 Q Now isn't it true that only about 50
19 of those stations were distantly retransmitted?

20 A That's correct.

21 Q So the vast majority were local to
22 local?

1 A Yes.

2 Q And so when you say that you oversaw
3 the launch of 2,100 stations and 143 DMAs, you
4 primarily are saying you were in charge of the
5 local to local retrans -- local to local
6 transmission, not a retransmission; correct?

7 A My -- let me explain. My duties were
8 everything regarding local into local, the must-
9 carry station election, then the retransmission
10 consent, and then the decisions of what stations
11 we would distribute into DMAs outside of the
12 station's DMA.

13 Q Okay. Now are you familiar with the
14 carry one, carry all rule?

15 A Yes.

16 Q And that rule essentially states that
17 if a satellite carrier decides it's going to
18 carry one local station, it's got to agree to
19 carry all local stations; correct?

20 A That's correct.

21 Q And in that situation, you would make
22 the decision okay, we want to carry some, some,

1 at least one local station. So now, because we
2 made that decision, we'll carry all of them;
3 correct?

4 A That's correct, in the DMA.

5 Q And that was actually -- and that was
6 required by law?

7 A Right.

8 Q Now in that circumstance, you -- well,
9 strike that. In a situation like that, to the
10 extent that there was one or maybe a couple of
11 stations locally that you wanted to transmit,
12 with regard to the other stations that you
13 weren't particularly being motivated by, did you
14 look at ratings to make a decision of whether or
15 not to carry one and carry all?

16 A Are you talking about in the DMA or
17 outside of the DMA?

18 Q Local to local in a DMA.

19 A I didn't have a choice. Either they
20 carry -- elected must-carry, in which case I must
21 carry them, or elected retrans, in which we would
22 have an opportunity to negotiate. So within that

1 process, there wasn't a Nielsen ratings element.

2 It was carry one, carry all.

3 Q Okay. Now in that kind of a
4 situation, I believe that cost was the overriding
5 concern, correct, as to whether or not to carry
6 one -- carry all of the local stations?

7 A Which costs are you referring to?

8 Q Well, I probably should have asked you
9 that first. Let me back up a step. When you
10 were making that decision about whether to carry
11 one and all local stations, was cost a
12 consideration?

13 A Yes. So like I testified before, we
14 went into a DMA. We looked at quite a number of
15 things. First of all, how many DirecTV
16 subscribers were in the DMA. We looked at the
17 topography, because in highly saturated markets
18 with multiple dwelling units, DirecTV did not do
19 as well, because cable was very entrenched.

20 We looked at the station lineup. We
21 at that time did not have our own installers. So
22 we looked to make sure that there was a strong

1 installer base there. We also looked -- also at
2 that time, we worked with big box retailers and
3 small mom and pop stores. So we looked to see if
4 we had enough stores there.

5 And then finally, we would install a
6 local collection facility, and we would like to
7 see which signals we were able to pick up at that
8 local collection facility. So there was an
9 absolute cost in every decision.

10 Q Now in terms -- you discussed earlier
11 negotiating with local stations. Do you recall
12 that?

13 A Yes.

14 Q Now that only occurred if the local
15 station exercised its right to demand its consent
16 to be broadcast locally; correct?

17 A They would elect retransmission
18 consent, and then we would negotiate.

19 Q So essentially you'd go into a DMA and
20 say okay, we want to have the local stations.
21 That means you have to carry one and carry all;
22 correct?

1 A Right.

2 Q But amongst those local stations, they
3 could say well, we're opting out of this, and
4 we're demanding that you get our consent. Is
5 that a fair way to describe it?

6 A Well, you wouldn't say "opt out."
7 They would either decide to elect must-carry or
8 elect retrans.

9 Q And if they elect retransmission
10 consent, essentially that local station is saying
11 is we won't allow you to retransmit us or
12 transmit us, I should say, unless you pay us some
13 money?

14 A They would -- it would be a
15 negotiation, exactly.

16 Q Right. Now in a situation of deciding
17 whether or not to rebroadcast a distant signal,
18 there was no negotiation; correct?

19 A That's correct.

20 Q And that's because the right to do
21 that was obtained by paying the compulsory
22 license; right?

1 A That's correct.

2 Q And so a distant retransmission was
3 essentially mutually exclusive with a local, the
4 local transmission; correct?

5 A Do you want to ask me that a different
6 way. I don't understand the way you're asking.

7 Q You know, I'll withdraw the question.
8 The point's covered. In the distant
9 retransmission context, there was no negotiation
10 with the signal or with the station, I should
11 say, whereas in local to local, where
12 retransmission consent was being raised, there
13 was negotiation. So they were fundamentally
14 different in that regard; correct?

15 A Yes.

16 Q Now you understand that these
17 proceedings only concern situations, royalties
18 collected for the right to retransmit distant or
19 distantly retransmit a broadcast?

20 A Yes.

21 MR. MACLEAN: Objection to that
22 characterization.

1 MR. BOYDSTON: As far as I know,
2 that's where you are.

3 JUDGE BARNETT: What's objectionable?

4 MR. MACLEAN: Well Your Honor, these
5 proceedings are about allocating royalties that
6 were paid for distant retransmissions. That's a
7 different question than --

8 MR. BOYDSTON: I think I just asked if
9 that the subject of the proceedings, and she said
10 yes.

11 MR. MACLEAN: I'll withdraw the
12 objection.

13 JUDGE BARNETT: Thank you.

14 BY MR. BOYDSTON:

15 Q Are you familiar with -- you're
16 familiar with pay-per-view orders, I have no
17 doubt?

18 A Yes.

19 Q And you understand that this
20 proceeding has nothing to do with the popularity
21 of programming, as reflected or demonstrated by
22 pay-per-view; correct?

1 A Yes.

2 Q Did DirecTV look at retained or
3 increased subscribership, and if so, how did it
4 tie that into distant retransmission royalties?
5 In other words, did DirecTV sit down on a
6 periodic basis and say "Gee, the distantly
7 retransmitted stations that we're paying a
8 compulsory license for, are resulting in certain
9 subscribership numbers"?

10 A Well, let me explain. So there's the
11 DMA, where all of the stations are carried, and
12 then they would be a neighboring DMA, and I would
13 look at the neighboring DMA to see if there were
14 some stations that I could distantly import, that
15 filled a niche, that were popular, that perhaps
16 cable was carrying but DirecTV wasn't carrying,
17 or I felt would be a strong asset to that lineup.

18 I primarily use Nielsen ratings, and
19 if I was able to, I would import that signal. I
20 would distantly transmit that station into the --
21 and also that DMA had to be unserved. So that
22 station could not -- they couldn't have that

1 station in that DMA.

2 So if that DMA had an ABC already, I
3 couldn't import or distantly transmit the ABC.
4 So it had to be unserved is the vernacular.

5 Q So when you were looking at that and
6 trying to make that decision, you said you were
7 usually looking to see if you could fulfill a
8 particular niche; correct?

9 A Yes.

10 Q Now a niche I consider by definition
11 to be something that is not broad, a subject
12 matter that's -- a niche. It's smaller. Is that
13 your understanding?

14 A The way that I looked at niches were
15 a subset of subscribers that might enjoy this
16 popular programming in certain categories.

17 Q So I mean for instance, something with
18 wide popularity like Monday Night Football
19 obviously is not niche programming, or is it?

20 A Sports you probably wouldn't
21 characterize as niche, the way that I
22 characterized it as niche.

1 Q Now when you were trying to determine
2 -- when you were looking for programs or stations
3 rather that would fulfill various niches, you
4 were looking -- you had to look at stations as
5 opposed to programs, right? In other words --
6 let me restate that.

7 When you were making this decision,
8 you were looking for niche programming; correct?

9 A Right.

10 Q But your choice was not the ability to
11 purchase the rights to retransmit a particular
12 program; it was to retransmit the station the
13 program was on; correct?

14 A That's correct.

15 Q So in doing that, you had looked at
16 the program certainly, but you knew that what you
17 were going to be paying for is not just the
18 program, but the whole station, all of the
19 programs on the station; correct?

20 A That's right. I would import that
21 entire station.

22 Q And to the extent that that station

1 might have very highly rated programs like
2 Everyone Likes Raymond, but that might not drive
3 your decision if what you were looking for is
4 something in niche like a cooking show. Is that
5 fair to say?

6 A I would primarily -- I don't think you
7 could make it that granular. I would primarily
8 look at the ratings of the entire station.
9 Sometimes it was driven by a hit show or a
10 popular show. But I, because there was, you
11 know, I needed to tell my management why I was
12 making this decision, I again looked at the
13 lineup of the ratings, and then the ratings were
14 primarily bolstered by hit shows or popular
15 shows.

16 JUDGE STRICKLER: Did you say a
17 moment ago, in answering counsel's questions,
18 that you look at two different things to
19 determine whether you would import from Market 2,
20 DMA 2 into DMA 1, one being the ratings that you
21 just testified to, but also whether or not that
22 station was on the cable -- was a cable-available

1 station in DMA 1?

2 THE WITNESS: Is DMA 1 the original
3 DMA or DMA --

4 JUDGE STRICKLER: DMA 1 is the
5 original one.

6 THE WITNESS: Okay. So --

7 JUDGE STRICKLER: So you wanted to
8 look -- if you wanted to also look to see if you
9 wanted to get that cable, in DMA 1 that station
10 was available on cable but wasn't yet available
11 on DirecTV.

12 So did you sort of say well, something
13 in the profit ratings. Do we want to meet the
14 competition, and get that station here in DMA 1
15 as well, so we can tell potential and existing
16 subscribers you don't have to be on cable to get
17 the station. You can get it on DirecTV?

18 THE WITNESS: So just to make, to
19 clarify, DMA 1 is the DMA that I am carrying one,
20 carrying all. DMA 2 is where I'm distantly --

21 JUDGE STRICKLER: DMA 1 is the
22 importer; DMA 2 is the exporter.

1 THE WITNESS: So I don't want to
2 emphasize too much the cable lineup, because
3 cable was renowned for carrying a lot of stations
4 that did not make a lot of sense. So it was
5 never apples to apples. I would look to see what
6 was there, and to see if my lineup was missing
7 something. But I would always go back to a
8 ratings, to make that determination.

9 JUDGE STRICKLER: This might not be
10 something you can answer, but you just said that
11 you noticed that cable would include a number of
12 stations that didn't make a lot of sense. Why
13 would cable have stations that didn't make a
14 whole lot of sense?

15 Or let me back up for a second. Did
16 they not make sense because they didn't have good
17 ratings, but they kept them on?

18 THE WITNESS: So let me answer it in
19 two parts. The reason that they might carry a
20 station that I'm saying didn't make a sense or
21 wasn't popular is sometimes with retransmission
22 consent, you're obliged to carry other of the

1 station group's stations or other things that
2 they have --

3 JUDGE STRICKLER: That are commonly
4 owned you mean?

5 THE WITNESS: Exactly.

6 JUDGE STRICKLER: So you're buying
7 the bundle?

8 THE WITNESS: Right, or there was a --
9 there was a reason. There was, you know, cable
10 just tended to really appeal to a large mass, and
11 they were kind of, in my mind, renowned for
12 carrying different things that might not have
13 really moved the needle.

14 And because at DirectTV there was a,
15 you know, I had to back up my decisions and there
16 was money involved, and I was a cost center, I
17 would not carry that entire lineup.

18 JUDGE STRICKLER: In addition to
19 cable carrying stations that weren't necessarily
20 popular because they had to be acquired in a
21 bundle, as you testified to, did cable also
22 acquire stations simply because they had -- they

1 represented certain types of niche genres that
2 might appeal to the marginal subscriber?

3 THE WITNESS: The cable operator?
4 Perhaps, you know. What I noticed was that there
5 were all sorts of reasons. In one DMA, a station
6 was carried because the CEO's wife was on the
7 staff. In other DMAs, you know, it was a bundle.
8 In others, it was kind of an odd one-off kind of
9 public service, you know, some station that maybe
10 just didn't really resonate with my demo, with my
11 demographic.

12 JUDGE STRICKLER: Thank you.

13 BY MR. BOYDSTON:

14 Q In response to one of the questions,
15 you said about these cable stations, that your
16 observation was there were channels which -- you
17 used different phrases. But one was you said it
18 didn't seem -- the cable stations tended to carry
19 -- sorry. Cable systems tended to carry stations
20 that didn't move the needle.

21 When you say "didn't move the needle,"
22 I presume you mean didn't have particularly

1 impressive ratings?

2 A That's correct.

3 Q Now going back just a little bit, with
4 regard to DirecTV, did DirecTV analyze whether or
5 not it was achieving increased subscribership due
6 to particular distant retransmissions, if you
7 know?

8 A Are you asking me because of one
9 particular station, did they analyze?

10 Q Yes.

11 A I don't know. My experience was is
12 that we took everything as a whole. So --

13 Q And when you say you took everything
14 as a whole, are you -- well, strike that. Well,
15 could you expand on when you say "everything as a
16 whole"?

17 I asked it, and I did ask a very, very
18 specific question, which was whether or not
19 anyone at DirecTV sat down and said you know,
20 that distantly retransmitted station we've just
21 been paying for for three years, it's increased
22 our subscribership or it's decreased our

1 subscribership? Your answer is you don't think
2 anyone made an analysis that specific, but there
3 may have been some more general analysis done?

4 A Yeah. I mean so there were certain
5 instances where I may have imported a distant
6 signal, where we had a big jump in subscribers.
7 So patting myself on the back, I could certainly
8 say that was it.

9 But so we didn't get as granular to
10 the specific station, but we would take into
11 account a lot of different aspects of what was
12 going on in each DMA, and we were quite focused
13 on what was again moving the needle in each DMA.

14 Q I'm sorry, you were or were not?

15 A We were.

16 Q You were. Now my understanding is,
17 though, is that DirecTV almost never dropped any
18 retransmitted stations; correct?

19 A Yes.

20 Q So once a retransmitted station was --
21 excuse me. Once DirecTV made the decision to pay
22 the compulsory license to retransmit a particular

1 station, after that it almost always continued
2 doing so; correct?

3 A We would continue doing so until that
4 DMA was served, for that particular station.

5 Q So you didn't -- DirecTV didn't go
6 back and say you know what? The ratings on this
7 particular -- the ratings we see for this
8 particular station we're paying a license on for
9 three years are lousy. We're discontinuing
10 paying the retransmission fee. That didn't
11 happen; correct?

12 A I don't believe so, no.

13 Q Now is it -- I believe that -- well,
14 you tell me. My understanding is that between
15 1999 and 2003, DirecTV only distantly
16 retransmitted between nine and eleven stations,
17 primarily stations from New York, Los Angeles and
18 Chicago. Is that correct do you think?

19 A What years?

20 Q '99 to 2003, just a handful of
21 stations from LA, New York, Chicago?

22 A Perhaps. I don't know exactly.

1 Q Yeah. Do you have any reason to
2 believe that's not the case?

3 A I would really to need to see. That
4 was quite some time ago, so I really need to see,
5 you know, the list of who we imported and what
6 the dates were.

7 Q Okay. There's a binder over there
8 which I'll help you with, and Your Honor, may I
9 approach?

10 JUDGE BARNETT: You may.

11 BY MR. BOYDSTON:

12 Q I'd like to take a look at what's been
13 marked as Exhibit 141. Now I'll represent to you
14 that this is a document that was prepared by IPG,
15 and these figures are, as I said, was prepared by
16 IPG.

17 I'd ask you to look at this, only to
18 the extent that looking at these numbers might or
19 might not refresh your recollection as to the
20 number of stations DirecTV was retransmitting
21 between 1999 and 2003, based upon what's on this
22 page.

1 A And sorry. Your question is?

2 Q Does this refresh your recollection as
3 to whether or not my representation might be
4 accurate, that between '99 and 2003, DirecTV only
5 rebroadcast about eight to nine stations?

6 A I don't know, but you have it here so
7 --

8 Q Okay. Do you have a recollection over
9 any of your time at DirecTV, as to how many --
10 well strike that. Between 2004 and 2009, do you
11 recall that DirecTV only distantly retransmitted
12 between 34 and 50 stations?

13 A Right, yes.

14 Q Okay, and during that time, the number
15 of stations that were locally retransmitted was
16 quite large?

17 A Yes.

18 Q In the thousands?

19 A Yes.

20 Q Given that disparity, I imagine there
21 was a lot more focus at DirecTV on looking at
22 local, the transmission of local stations, rather

1 than the retransmission of distant stations?

2 A Our primary focus was to get more DMAs
3 served, yes.

4 JUDGE FEDER: Excuse me. Would you
5 just clarify what you mean by getting more DMAs
6 served?

7 THE WITNESS: Sure. So we would want
8 to launch more DMAs, because that would enable us
9 to compete against cable. Once we had local
10 stations in the DMA, it really solidified our
11 place, our place in the market. So we would want
12 to expand that.

13 JUDGE FEDER: So by serving a
14 particular DMA, you mean going in and getting
15 retransmission consent deals with local stations
16 for local into local retransmissions?

17 THE WITNESS: Exactly, or they could
18 elect must-carry.

19 JUDGE FEDER: Right, okay.

20 BY MR. BOYDSTON:

21 Q Of the handful of stations that were
22 distantly retransmitted, do they primarily come

1 from sort of the big media hubs like LA, New
2 York, Chicago?

3 A It just depended on a number of
4 different things. So that's hard to say.

5 Q Did amongst those, were the stations
6 that were distantly retransmitted by DirecTV
7 during that time from New York, LA and Chicago?

8 A Yes.

9 Q Were there -- were there other places
10 that you can recall that they were distantly
11 transmitted from?

12 A We -- I made the decision to import
13 from a number of different cities, just depending
14 on our spot beam technology, or where I thought
15 the most popularity would be. So it didn't make
16 sense to import like a Telefutura from Miami to
17 Wichita, Kansas. It just wouldn't be that
18 popular or make any sense.

19 Q Right, whereas stations like the ABC
20 affiliate in New York would probably be something
21 that a lot of people would be interested in
22 theoretically, right?

1 A You would think.

2 Q You testified that there was explosive
3 growth in satellite retransmission between 1999
4 and 2009. Is it fair to say that at least with
5 regard to DirecTV, that explosive growth was in
6 the local to local context?

7 A You cannot characterize it just
8 because of local into local. There were a number
9 of reasons. But we were able to compete on an
10 even playing field when we had local stations in
11 a market.

12 Q When you had local stations in a
13 market, right? Right. And so, I mean, we're
14 talking about explosive growth. 21,000
15 retransmissions, or rather 21,000 locally
16 transmitted stations is a lot of stations. That
17 implies explosive growth from some lower number.
18 Is that what you mean when you're talking about
19 explosive growth?

20 A 2,100.

21 Q I'm sorry.

22 A 21,000.

1 Q I stand corrected.

2 A But so let me explain that. So when
3 we had explosive growth, again local into local
4 lead us on an even playing field. But we were
5 really able to compete effectively on a number of
6 different aspects, because the signal quality was
7 so much better.

8 Our cost centers, our CSRs, there were
9 a lot of other issues. So local into local was
10 sort of the foundation, and then we went from
11 there.

12 Q Okay. Now DirecTV didn't actually
13 order ratings data from Nielsen itself; correct?
14 It obtained them from advertisers and things like
15 that?

16 A We had a number of different groups
17 that supplied -- within DirecTV, we had a number
18 of different groups that would supply information
19 to me. We had a research group, a business
20 analytics group, an advertising group and a
21 customer service group, and many of them have
22 access to Nielsen information that I relied on.

1 Q But it sounds like there wasn't a
2 formal relationship between DirecTV and Nielsen,
3 where DirecTV was paying for a bunch of
4 information, including underlying data and stuff
5 like that?

6 A That's correct.

7 Q And so did the Nielsen information you
8 got, it was just what was given to you by other
9 people or entities; correct?

10 A Yes.

11 Q And it was -- there was the Nielsen
12 data that DirecTV got, it was just for local
13 ratings; correct?

14 A We got Nielsen ratings for everything,
15 every broadcaster, every cable network. We
16 looked at Nielsens for everything.

17 Q But within a given DMA; correct?

18 A No. We would look at everything in a
19 DMA, how every network was doing as well.

20 Q Within a DMA; correct?

21 A Yes.

22 Q Right. In other words, you got

1 ratings -- when you said you got ratings for
2 everything, you got ratings for everything that
3 you could within a DMA, right?

4 A Yeah, and then we would also get
5 nationals. We would get regional. We cut our --
6 the research in every which way.

7 Q But DirectTV never engaged Nielsen to
8 study distant ratings?

9 A No.

10 Q Did DirectTV ever look at ratings
11 according to the timing of programs, ratings
12 during a particular time block or a time of the
13 day, in order to determine whether or not it was
14 filling a gap of lower ratings on other DirectTV
15 broadcasts?

16 A I would look at day parts, in addition
17 to overall ratings, and again, I would look at
18 some of the breakout, more popular programming as
19 well.

20 Q Turning to the subject here, which is
21 about devotional programming or religious
22 programming as sometimes it's called, is it your

1 understanding that religious programming was a
2 fairly small portion of overall programming
3 appearing on distantly retransmitted stations?

4 A Was it a small portion of the
5 distantly retrans?

6 Q Correct.

7 A I don't know.

8 Q Was it a small portion of DirecTV's
9 programming generally?

10 A Yes.

11 Q Would you say something on the order
12 of three percent?

13 A I don't know the exact percentage.

14 Q Okay. You had a general knowledge as
15 to whether or not religious shows generally
16 garner large or small ratings relative to other
17 programming?

18 A Relative to other programming, it
19 garnered smaller ratings.

20 Q Do you consider -- well, we talked
21 about niche programming. Would Spanish language
22 programming be niche programming, or is it bigger

1 than that?

2 A Spanish is a niche.

3 Q Okay. Now let's go back to the niche
4 issue again. If you have two channels with
5 identical niche programming, in other words like
6 two different children's shows. They're
7 different shows, but they fit the same niche, or
8 let me strike that.

9 Let's say you're looking at your
10 lineup in a particular DMA, and you have a
11 children's show, and it garners some ratings, but
12 ratings that are small relative to other non-
13 niche programming. Then you're taking into
14 consideration whether to use another local
15 station that has other children's programming on
16 it.

17 Even if that other program with other
18 children's programming had ratings that were
19 relatively attractive, would you take into
20 consideration whether or not bringing that into
21 your lineup would simply displace the viewership
22 that was already being garnered by the existing

1 niche programming, in this case a children's
2 show?

3 A I'm not sure what you're asking me.

4 Q I'm try a different -- I'll try a
5 better way if I can, and I'm focusing on your
6 making the decisions about niche programming, and
7 I guess what I'm really wondering is wouldn't
8 your decision signs by influenced by the thought
9 that well, there's interesting niche programming
10 over here, a cooking show let's say, but I've
11 already got these cooking shows here.

12 So because of that, even though this
13 show is good, gets nice ratings and everything,
14 I'm not really adding anything new. At most, the
15 people who watch my existing show might just
16 continue to watch cooking shows on this new
17 channel, and so maybe it doesn't add much. Did
18 you ever have analysis like that?

19 A Yes, exactly. I would see what was in
20 a DMA. I'm assuming you're talking about
21 distantly broadcast, and I would see what would
22 be needed to round out the lineup, and what would

1 add new subscribers or keep existing subscribers.

2 Q And if a show wasn't helping to round
3 out, then it might not be of much interest,
4 right?

5 A If a station, yeah. If a station --
6 I used to say if a station wasn't going to sing
7 for itself or work for me, I would not bring it
8 in.

9 Q And you used the term "round out." I
10 think we all pretty much know what you mean. But
11 in this context, when you say "round out," what
12 it means is is that okay, I think round like a
13 wheel. We've got different types of programming.

14 We seem to have all this covered.
15 This other station, while it looks kind of cool,
16 it's in the part that's already covered. So it
17 doesn't round out the station. Is that a fair
18 way to put it, or it doesn't round out the
19 DirecTV lineup?

20 A If it didn't round it out or if I
21 thought that by adding a station that had a niche
22 that might bring me more subscribers, I would

1 normally go with the station that has the niche,
2 that would bring me more subs.

3 Q But if it's a niche that's already
4 covered, it probably wouldn't bring new
5 subscribers. Fair enough?

6 A Perhaps.

7 Q You used the example earlier on about
8 the Japanese station that got dropped, and then
9 everyone got mad. Do you recall that?

10 A (No audible response.)

11 Q And I don't think I quite caught your
12 explanation. I think I just didn't hear part of
13 the words. I imagine that that Japanese
14 programming, the station with Japanese
15 programming, was low rated relative to all of the
16 programming, because it was a fairly targeted
17 audience; correct?

18 A And let me be clear. It was a cable
19 network. It wasn't a station, and it was very
20 low rated.

21 Q And you said that the decision was
22 made well, we don't need to keep carrying this,

1 and then the hue and cry was so great, that you
2 got calls at home and things like that, and the
3 reaction was all right. Well, it's low-rated,
4 but apparently people feel passionately about it
5 I guess, right?

6 A There is a passionate group for every
7 station, yes.

8 Q And so you recognize that regardless
9 of the fact it was low rated, it was worth
10 carrying?

11 A Well, I wouldn't say it was worth
12 carrying, because it was extremely low rated. It
13 was taking up very valuable bandwidth, and we
14 were able to contain the cry. But we learned a
15 very valuable lesson when we dropped that, and we
16 decided that we would not do that in the future,
17 because we didn't want to upset our base, to lose
18 subscribers, overwhelm our call center by having
19 to make people call in or get bad publicity.

20 Q So there were business reasons to keep
21 it; correct?

22 A There were business reasons to keep

1 it, yes.

2 JUDGE STRICKLER: In that particular
3 situation, how important was bad publicity
4 relative to the other factors?

5 THE WITNESS: It was important for
6 DirectTV not to get bad publicity.

7 JUDGE STRICKLER: I understand that,
8 but was there actual bad publicity that you were
9 experiencing with regard to the removal of that
10 Japanese station?

11 THE WITNESS: I don't believe so. It
12 was really long ago, and it was a very vocal
13 constituency. But I don't believe we got bad
14 publicity from it.

15 BY MR. BOYDSTON:

16 Q I understand that you've never worked
17 for a CSO; correct?

18 A Correct.

19 Q Nevertheless, based upon your
20 familiarity with people who have, is it your
21 understanding that they have a similar view of
22 the necessity for niche programming?

1 A Yes.

2 Q Do you know, and I don't know if you
3 would have occasion to know this, but do you know
4 how many signals a CSO typically retransmits
5 distantly?

6 A No.

7 Q You've brought up the term "unserved
8 household" earlier.

9 A Right.

10 Q Could you -- well is it -- my
11 understanding is that an unserved household is a
12 legal rule that says that in order to receive a
13 distant network station, the household has to be
14 unserved, meaning it doesn't -- it isn't getting
15 a network feed or something like that?

16 A Yeah. The way that I would describe
17 it is in that DMA, if a station does not exist.
18 So it's unserved for that particular station.

19 Q Okay. Now in a situation like that,
20 the decision where to distantly retransmit a
21 signal may have more to do with the viewer
22 qualifying as an unserved household, than the

1 ratings of a potential station; correct?

2 A I could not bring in a distant network
3 signal if that DMA had that -- I testified to
4 this -- if that signal was already being
5 broadcast in that DMA.

6 Q No matter how great the ratings might
7 be, that just couldn't be done?

8 A Could not be done. Let me clarify.
9 There were very corner cases where I might get
10 permission from the existing station to bring in
11 the distant, the competing distant signal, but
12 that's not a -- it was very difficult to get that
13 permission.

14 MR. BOYDSTON: Thank you. I have
15 nothing further.

16 JUDGE BARNETT: Do you have more
17 questions Mr. Olaniran?

18 MR. OLANIRAN: No questions, Your
19 Honor.

20 REDIRECT EXAMINATION

21 BY MR. MACLEAN:

22 Q Now Mr. Boydston asked you a question

1 about whether you forwarded the email from Mr.
2 Galaz, with an attachment to Mr. Lutzker; is that
3 right?

4 A Yes.

5 Q That was recent; correct?

6 A Yes, that was recent.

7 Q When was that?

8 A It was within the last 30 days.

9 Q Since IPG started raising allegations
10 that it may have sent you confidential
11 information?

12 A Yes.

13 Q In the course of preparing your
14 testimony, your written testimony in this matter,
15 did you consider or incorporate anything from
16 what you received from Mr. Galaz?

17 A I did not.

18 Q Did you discuss anything that you
19 received from Mr. Galaz with any of the counsel
20 for the SDC?

21 A I did not.

22 Q Did you show us at that, that is prior

1 to your written testimony, or at any time before
2 just recently, any email that you had received
3 from Mr. Galaz?

4 A I did not.

5 MR. MACLEAN: Nothing further, Your
6 Honor.

7 MR. BOYDSTON: Nothing further.

8 JUDGE STRICKLER: I have a couple of
9 questions for her.

10 JUDGE BARNETT: Ask.

11 JUDGE STRICKLER: Okay. I'm going to
12 direct you to page eight of your written
13 testimony, Ms. Berlin. Tell me when you're
14 there.

15 THE WITNESS: Yes.

16 JUDGE STRICKLER: Thanks. In
17 footnote seven, you make reference to the FCC
18 mandate that DirectTV take four percent of its
19 capacity, about ten channels for non-commercial
20 channels. Do you see that?

21 THE WITNESS: Yes.

22 JUDGE STRICKLER: In the next

1 sentence, you testify "Many religious channels
2 applied for the PIO, Public Interest Obligation
3 channel spots," right?

4 THE WITNESS: Yes.

5 JUDGE STRICKLER: Of those many
6 religious channels that applied for it, how many
7 got it?

8 THE WITNESS: I really don't recall,
9 but most of them did. It's -- that's pretty much
10 who applied for that carriage.

11 JUDGE STRICKLER: So if they got
12 those PIO spots, you were running those to
13 fulfill a statutory obligation, not to -- not
14 because they were highly rated within a niche or
15 otherwise?

16 THE WITNESS: These were mostly cable.
17 A lot of them were cable networks, and we carried
18 -- they weren't stations, although some of them
19 did have stations. But these were carried
20 nationally as a cable network.

21 JUDGE STRICKLER: And your decision
22 to carry them was based on your obligation at

1 DirectTV to fulfill that FCC requirements, as
2 opposed to promote ratings?

3 THE WITNESS: The public interest
4 platform, we needed to balance a number of
5 issues. So popularity of programming, ratings,
6 what the network looked like, who it would
7 attract, and in these particular instances,
8 actually that's what we would look at, and who
9 else was in the pot is what I was going to say.

10 So it was a little bit of a tightrope,
11 because it was a very competitive group that
12 wanted the ten or whatever it became. Each year
13 we had to recount.

14 JUDGE STRICKLER: It was a
15 competitive --

16 THE WITNESS: The group that applied

17 --

18 JUDGE STRICKLER: For the PIO
19 designation?

20 THE WITNESS: Yeah. It was very
21 competitive. It was very -- folks that didn't
22 get it were very angry. So we had to be very

1 careful how we went about the process.

2 JUDGE STRICKLER: So what factors did
3 you consider specifically -- well, this is a
4 religious niche we're talking about. What
5 factors did you consider, since you got more
6 applicants than you needed? How did you decide
7 who got admitted and who didn't get in?

8 THE WITNESS: Well again, we looked at
9 popularity. We sampled the programming. We
10 liked to do a mix. So in addition to religion,
11 we got some distant learning. We got, as I
12 recall, a couple of music kind of travel
13 channels. So we -- so in addition to the mix, it
14 was popularity and how it looked. Some of them
15 just didn't look great.

16 JUDGE STRICKLER: So this is sort of
17 a baby, a sub-niche. In other words, it's
18 religious programming that will fulfill a
19 particular regulatory requirement, and within
20 this sub-sub-niche, you then used popularity
21 through ratings, to determine or buy, as I think
22 you mentioned as one of your viewership measures,

1 to determine which of the programs in this sub-
2 sub-niche are going to get the PIO designation
3 and get aired?

4 THE WITNESS: Yes.

5 JUDGE STRICKLER: And the ones that
6 you mention on page eight of your testimony,
7 there's the Easter Pageant from the Crystal
8 Cathedral. Was that a PIO?

9 THE WITNESS: So those were just --
10 I'm sorry I interrupted.

11 JUDGE STRICKLER: That's okay. Was
12 the Easter Pageant that you referenced from
13 Crystal Cathedral, was that one that received the
14 PIO designation?

15 THE WITNESS: That was a pay-per-view
16 event. So it was just a one-time show. We did
17 it every year, and the subscriber could click and
18 buy it for 3.99.

19 JUDGE STRICKLER: I understand. Does
20 that go towards the PIO designation or it
21 doesn't?

22 THE WITNESS: No.

1 JUDGE STRICKLER: Pay per view
2 doesn't apply towards that?

3 THE WITNESS: No.

4 JUDGE STRICKLER: Okay, I got it.
5 And how about the other ones you mentioned, the
6 specialty devotional programs. You mentioned the
7 church service from the University of Notre Dame.
8 Did that count towards it?

9 THE WITNESS: No. It needed to be a
10 24 by 7 channel. We called it a 24 by 7
11 turnaround. So it needed to a fully owned
12 program channel.

13 JUDGE STRICKLER: So am I correct,
14 that none of the programs that you mention on
15 page eight were those that qualified for the PIO
16 designation?

17 THE WITNESS: Correct.

18 JUDGE STRICKLER: Okay, thank you.

19 JUDGE FEDER: I'm just trying to get
20 a handle on how carry one, carry all works. So
21 suppose in a particular DMA there were four local
22 channels. One opts for must-carry. Does that

1 have anything to do with the carry one, carry all
2 rule?

3 THE WITNESS: Yes. So let's say we
4 decide to go into Philadelphia. I give notice to
5 every station in Philadelphia, and half of them
6 elect must-carry, that I must carry them, and
7 then the other half elects retrans, and then I
8 would negotiate.

9 JUDGE FEDER: But you must negotiate
10 with them under carry one, carry all?

11 THE WITNESS: Yes. There was a good
12 faith negotiation standard.

13 JUDGE FEDER: And if there's a
14 holdout?

15 THE WITNESS: Then I don't have to
16 carry them.

17 JUDGE FEDER: Okay. So one station
18 can't hold up going into the DMA by holding out?

19 THE WITNESS: Correct, yes.

20 JUDGE FEDER: All right, thank you.

21 JUDGE BARNETT: Any follow up
22 questions?

1 MR. OLANIRAN: No, Your Honor.

2 MR. MACLEAN: No.

3 JUDGE BARNETT: Thank you, Ms. Berlin.

4 THE WITNESS: Thank you.

5 (Witness excused.)

6 JUDGE BARNETT: It's time for our noon
7 recess. We will be at recess for one hour.

8 (Whereupon, the above-entitled matter
9 went off the record at 11:57 a.m. and resumed at
10 1:06 p.m.)

11 JUDGE BARNETT: Mr. Boydston, you may
12 call your first witness.

13 MR. BOYDSTON: Your Honor, Independent
14 Producers Group calls Raul Galaz.

15 WHEREUPON,

16 RAUL GALAZ
17 was called as a witness by Counsel for the
18 Independent Producers Group and, having been
19 first duly sworn, assumed the witness stand, was
20 examined and testified as follows:

21 MS. PLOVNICK: Before we get started
22 here, just for the record, MPAA has a motion to